(2)

No. 89-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DENNIS KOHL, by his parents and guardians,
Norbert Kohl and Jean Kohl,

Petitioner,

vs.

WOODHAVEN LEARNING CENTER, a corporation, and
WOODHAVEN SCHOOL, INC., a corporation,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Rule 28.1 List

Regarding Respondent Woodhaven Learning Center:

National Benevolent Association, St. Louis, MO

Alaska Children's Services, Inc., Anchorage, AK

NBA Health Services Corporation, dba Bethany Convelescent Hospital, San Jose, CA

Christian Church Facilities for the Aging, Inc., dba Bethany House, Rockville, MD

NBA Health Services Corporation dba Bethesda Manor & Convalescent Center, Los Gatos, CA

Suncoast Christian Housing, Inc. dba Burlington Tower, St. Petersburg, FL

Christian Church Homes of Northern California, Inc. dba Buttes Christian Manor, Marysville, CA

California Christian Home, Rosemead, CA

Shaker Heights Housing Associates dba Campbell Court, Shaker Heights, OH

Campbell-Stone Apartments (Inc.), Atlanta, GA

Campbell-Stone North Apartments (Inc.), Atlanta, GA

Campbell-Stone Memorial Residence (Inc.) Denver, CO

Thomas Campbell Apartments (Inc.), Thomas Campbell North Apartments (Inc.), Washington, PA

Centennial Housing Corporation dba Centennial Plaza Apartments, St. Louis, MO

Disciples Homes of Northeast Texas, Inc. dba The Chalice Apartments, Henderson, TX

Child Saving Institute, Omaha, NE

Christian Housing of St. Joseph, Inc. dba Chilton Place, St. Joseph, MO

Christian Church Homes of Northern California, Oakland, CA

Christian Manor, West Palm Beach, FL

First Christian Towers of Plainview, Inc., Christian Manor Apartments, Plainview, TX

The Cleveland Christian Home (Incorporated), Cleveland, OH

Colorado Christian Home, Denver, CO

Disciples Ministry for the Elderly, Inc. dba Confer Vista, Uniontown, PA

Cypress Village, Inc., Jacksonville, FL

Desertview Developmental Services, Las Vegas, NV

Disciples' Village (of Tulsa, Inc.), Tulsa, OK

Northeast Texas Disciples Homes, Inc. dba Eden Place, Longview, TX

The Emily E. Flinn Home, Inc. dba Flinn Memorial Home, Marion, IN

Florida Christian Apartments, Inc., Jacksonville, FL

Florida Christian Center (Inc.), Jacksonville, FL

Florida Christian Center, Inc. dba Florida Christian Health Center, Jacksonville, FL

Hillyer House

Our House, Jacksonville, FL

Fowler Christian Apartments (Inc.), Dallas, TX

Juliette Fowler Homes (Inc.), Dallas, TX

Foxwood Springs Living Center, Raymore, MO

Christian Church Homes of Northern California, Inc. dba Garfield Park Village, Santa Cruz, CA

Gateway Homes, Inc., St. Louis, MO

First Christian Manor, Inc. dba Golden West Manor, Boulder, CO

Heritage Towers of the Christian Church (Disciples of Christ), Sheridan, WY

The Lutheran Inner-City Center of Jacksonville, Inc. dba Hollybrook Homes Apartments, Jacksonville, FL

Kansas Christian Home, Inc. (Disciples of Christ), Newton, KS

Indiana Disciples Housing Corporation dba Ken-Mar Apartments, Martinsville, IN

Kennedy Memorial Christian Home, Inc. dba Kennedy Living Center, Martinsville, IN

Ames Ecumenical Housing, Inc. dba Keystone of Ames, Ames, IA

Lenoir, Inc. dba Lenoir Retirement Community, Columbia, MO

Sedalia Elderly Housing dba Liberty Apartments, Sedalia, MO

Longview Christian Retirement Center (Inc.), Longview, TX

Christian Churches Housing Foundation dba Meadows Point Apartments, Enid, OK

NBA/GPVA Accessible Housing, Inc., St. Louis, MO

NBA Health Services Corporation, Los Gatos, CA

Oklahoma Christian Apartments (Inc.), Edmond, OK

Oklahoma Christian Home (Inc.), Edmond, OK

Oklahoma Disciples Apartments, Edmond, OK

Christian Church Homes of Oregon dba Olive Plaza, Eugene, OR

Portland Disciples Housing, Inc., dba Powell Vista Manor Gresham, OR

Ramsey Home, Des Moines, IA

Residential Care Services, Inc. dba Hasina House, Pittsburg, PA

River Mountain Services, Inc., Reno, NV

Greater Indianapolis Disciples Housing Inc. dba Robin Run Village, Indianapolis, IN

Sage Tower, Billings, MT

St. Louis Christian Home, St. Louis, MO

Serra Homes, Incorporated, Fremont, CA

NBA dba Serra Residential Center (Inc.), Fremont, CA

Southern Christian Home, Inc. dba Southern Christian Services, Macon, GA

Southern Christian Services in Mississippi dba G.A.I.N., Jackson, MS

Lewistown Area Community Development Corporation dba Spoon River Towers, Lewistown, IL

Barton W. Stone Christian Home (Inc.), Jacksonville, IL

Christian Church Homes of Iowa, Inc., Stone Crest, Des Moines, IA

Florida Christian Manor, Inc. dba Sundale Manor, Jacksonville, FL

Christian Church Homes of Washington dba Tacoma Vista Village, Tacoma, WA

Christian Church Homes of Idaho, Inc. dba Valley Vista Village, Twin Falls, ID

Arizona Disciples Homes, Inc. dba Waymark Gardens, Glendale, AZ

Christian Church Homes of Northern California, Inc. dba Westlake Christian Terrace - East, Westlake Christian Terrace - West, Oakland, CA

Woodland Christian Towers (Inc.), Houston, TX

WPC Housing Corporation, St. Joseph, MO

Northwestern Retirement Housing, Inc. dba Mattie Younkin Manor, Gresham, OR

Regarding Respondent Woodhaven School, Inc:

None, except that, subsequent to trial in the District Court, this respondent changed its corporate name to Alternative Community Training, Inc. For convenience, this document will continue to use this respondent's name as it was during trial.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Woodhaven Learning Center and Woodhaven School, Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 865 F.2d 930 (1989).

STATEMENT OF THE CASE

At the time of the trial of this matter, the petitioner was 32 years old (T. 1/4), and at the time he was evaluated for possible admission by the respondents in 1984, he was mentally retarded,

bilaterally blind, exhibited maladaptive behavioral problems including scratching, biting, open masturbation, and acts of self-abuse, and was an active carrier of hepatitis B, e-antigen positive (T. 1/18, 19, 21-24, 38-39, 140-41; 3/31-32; D. Exs. 10, 11, 21, 22, 23, 31, 36, 37, 38, 39, 43, 45, 58; P. Exs. 8, 9, 11, 13, 15, 17, 21). All of such factors remained true on date of trial except petitioner's carrier status of hepatitis B changed to e-antigen negative which reduced somewhat the transmissibility of his hepatitis B (P. Exs. 11, 13; T. 3/31-32).

At the time the application was submitted to Woodhaven Learning Center, neither the staff of Woodhaven Learning Center nor the staff of Woodhaven School (T. 4/68-69; 3/153) had been screened or immunized for hepatitis B, and neither institution had plans for, nor the funds to pay for, such screening and inoculation. Furthermore, at the time of petitioner's application, none of the clients at either institution had been screened or inoculated for hepatitis B (T. 4/68-69; 3/153).

Petitioner resided at Woodhaven Learning Center from July 16, 1984, to October 26, 1984, for the purpose of evaluation, and during this period of time he was evaluated by both respondents and was found by both not to be appropriate at that time for placement in their respective programs (T. 3/140-43, 150-54; 4/62-72, 77-78; D. Ex. 61).

During the period the petitioner was at Woodhaven Learning Center for evaluation, the staff of Woodhaven Learning Center kept a chart of his negative behaviors (D. Ex. 31). This compilation revealed that on a daily average the petitioner committed 8 acts of aggression against staff and 7 acts of a self-abusive nature. Material submitted with the application revealed (P. Ex. 15) that a listing of his behavioral characteristics showed that he scratched, pulled hair, had temper tantrums, tore clothes, threw objects, kicked, struck, and bit others. While at Woodhaven Learning Center, the petitioner was self-abusive on one occasion by punching out his own eye (T. 3/143-45; P. Ex. 22).

After leaving respondents' facilities in October of 1984, petitioner was placed in public facilities of the Missouri Department of Mental Health in St. Louis, and later evaluations introduced as exhibits showed he continued to have behavioral problems including biting, hitting, scratching, and poking his eye (D. Exs. 18, 19).

During the period of evaluation and prior to reaching a determination that the respective facilities and programs of the respondents would be an inappropriate placement for the petitioner at that time, the respondents reviewed scientific literature and medical information pertaining to the medical risks and possible transmission routes of hepatitis B, consulted with medical officials of the State of Missouri Department of Mental Health, reviewed the "Hepatitis B Informational Package" which had been prepared by Dr. Mohammad Akhter of that Department (D. Ex. 17), and obtained advice from Clarence Pickard, M.D., with respect to the dangers and risks of hepatitis B, how it is transmitted, and how transmissibility is effected by maladaptive behavior such as biting and scratching. The expert medical advice received by respondents was that all employees and clients should be protected by screening and inoculation for hepatitis B prior to admitting the petitioner (T. 3/25; 4/78-79, 87-88).

Medical testimony revealed that aggressive behavior, such as biting and scratching, makes it far more likely that hepatitis B will be transmitted (T. 1/167, 171-73; 3/10, 12-13, 25, 37). Medical testimony further revealed that anyone coming into contact with this type of client needs to be immunized through screening and inoculation and that if the policies of the institution (such as both respondents have) require employees to intervene and assist when difficulty is being encountered with a client, all employees need to be properly immunized (T. 1/171-73; 3/13, 21, 25, 29, 30). The aggressive behavior of biting and scratching constitutes a danger to those around the active carrier, irrespective of whether the carrier is e-antigen

positive or negative (T. 3/13). Petitioner's own medical experts stated it would be ideal and preferred to have all employees protected by screening and inoculation as the Department of Mental Health has done and as is recommended by the Centers for Disease Control (T. 1/170-71, 197-98, 5/14-21).

Woodhaven Learning Center no longer has programs which serve individuals with behavioral problems such as those exhibited by the petitioner, and the licensure requirements of the State of Missouri do not allow placement of clients with such problems at that institution (T. 3/133, 159-60, 186-88; 4/4-6, 14, 15, 77, 101-02; P. Ex. 19). The Department of Mental Health is not currently recommending petitioner's placement at respondents' institutions (T. 2/78; affidavits of Shrewsbury, Miller, Sluyter, Geis, and Beacham). At the time of trial, Woodhaven Learning Center had no clients who were carriers of hepatitis B (T. 3/154-58). A single carrier was receiving services from Woodhaven School, but that client had no behavioral problems, understood her carrier status, and took special precautions to protect others (T. 4/91-94).

Petitioner's current placement at the Northwest Habilitation Center in St. Louis County is a proper placement according to the testimony of the casemanager, and petitioner's psychological expert stated he is doing very well at that institution (T. 2/49; 3/51; 4/4-5, 103-04). The Department of Mental Health has recommended "mainstreaming" the petitioner and not placing him in a special program for the blind such as he would be in at respondents' institutions (T. 2/82-85). Special behavioral programs currently in effect as part of his care could not be used if he were at respondents' facilities (T. 4/5-6). The Executive Directors of the respondents stated that the environment at their respective institutions would be more restrictive on the petitioner than his present placement (T. 4/6-7, 104), and petitioner presented no contrary testimony. Furthermore, isolation, to any degree, if required to protect employees and clients from exposure to hepatitis B, would require fundamental

changes in the operation of respondents' programs (T. 4/83-86, 102-03).

The district court made certain Findings (paragraphs 53, 54, 55, 58, 59, and 61, 672 F. Supp. at 1232-33) to the effect that not all of the employees of the respondent institutions would need to be vaccinated against hepatitis B if respondents had an aggressive, biting and scratching client present who was an active carrier of hepatitis B. In fact, however, there was no such testimony before the Court. Two of petitioner's witnesses suggested this hypothetically (Dr. Perrillo—T. 1/148-50; Dr. Donnell—T. 5/4-7), but both admitted that they knew nothing about either Dennis Kohl or the respondent institutions and their personnel practices and policies (T. 1/161-64; 5/8). Undisputed evidence from several witnesses established that the Department of Mental Health required all its employees, even those without client contact (T. 2/98; 3/105-06; 4/69-71) either to be vaccinated or sign a release (T. 2/97; 3/110), and the Department paid for all these vaccinations (T. 2/84). Even petitioner's expert witnesses said that the ideal situation would be for all employees of respondents to be vaccinated (T. 1/150, 170-78, 201; 5/14), and that anyone with a significant chance of coming into contact with Dennis Kohl ought to be inoculated (T. 1/149; 5/5-6).

Petitioner's experts' opinions that it would be possible to vaccinate less than all staff if Mr. Kohl were present at respondents' institutions were based on assumptions that Mr. Kohl could be isolated, or surrounded by immune staff, and other staff could be instructed not to deal with him (T. 1/184; 5/8). These assumptions, however, were shown to be false for several reasons. The evidence showed that both facilities are open, with clients necessarily allowed full access to all areas of the institution (T. 4/11-12, 79-86). Woodhaven Learning Center's administration building serves many purposes for clients, including recreation, practice for bell choir, dances, Bible study, church services, and other large group activities. In addition to

offices, the nursing station, gym, and swimming pool are located in the building (T. 3/169), and clients are free to come and go in all areas of the building, including the offices (T. 4/11-12). A similar situation exists at the facilities of Woodhaven School, where clients take breaks in areas shared with staff, get change from secretaries, and use a soda machine (T. 4/79-86). The facilities of the School are not segregated into individual rooms, and clients and staff have open access to all areas and move around freely. Woodhaven Learning Center has twice weekly gatherings for all clients and all staff (T. 3/163). Even janitors have direct care responsibilities during part of their time on duty (T. 2/164), and some staff members must necessarily be assigned to different buildings on different days (T. 3/162).

Both Woodhaven Learning Center and Woodhaven School, Inc. operate under rules that require all staff to intervene in a situation where a client's behavior is uncontrolled or where the client's medical needs require it (T. 3/170-71; 4/81-83) and, if a staff member failed to intervene, he or she would be fired or the facility would lose its license (T. 3/171; 4/82). The same licensure rules prohibit the use of isolation at respondents' institutions, so the kind of separation or segregation advocated by petitioner and inferred by the district court's order as a means of reducing the numbers of staff who would need inoculating if a hepatitis B carrier with aggressive behavior were present is likewise not permitted (see T. 4/12, 85-86).

All medical experts who testified either recommended that all staff at respondents' institutions be inoculated against hepatitis B if an aggressive or self-abusive carrier were present (T. 1/170-71 (Perrillo); 3/29-30 (Pickard)) or agreed that such a decision would be reasonable under the facts (T. 3/16-17 (Cooperstock); 5/17-18 (Donnell)).

The evidence established that even if funds were available and an inoculation program were undertaken, and even if the ad-

ministrative problems could be overcome, if an aggressive or self-abusive hepatitis B carrier were present, the inoculation program would not eliminate the risk of others contracting hepatitis B from the carrier (T. 3/171-73). This is because the vaccine is only about 85% effective (T. 1/130, 176) which would leave a sizeable number of clients and employees at both respondents' facilities without immunity (T. 3/160); because staff turnover is so rapid (50-75% per year) that a large percentage of staff at any given time would be so new that they would not yet have completed the shots (T. 4/15-16); because the institutions depend on students and volunteers who cannot be required to take the shots (T. 4/17-18, 32); and because isolation or segregation of clients is both impractical (T. 3/162-64) and unpermitted by licensing regulations (T. 4/12).

REASONS THE PETITION SHOULD BE DENIED

I. Supreme Court Review At This Stage Of This Case Would Waste Judicial Resources And Amount To Rendering An Advisory Opinion Because No Challenge Is Made By Petitioner To One Of Two Grounds Upon Which The Court Of Appeals Ordered Remand.

In the 18 pages of the petition, not even a passing or footnote reference is made to the issue of "least restrictive environment," which is the basis upon which the Eighth Circuit unanimously ordered remand. *Kohl v. Woodhaven Learning Center,* 865 F.2d 930, 935, 941 (8th Cir. 1989). Petitioner has conceded throughout this litigation that, under applicable law, Mr. Kohl must be housed in his "least restrictive environment." In fact, during the trial *petitioner* sought and obtained judicial notice of the Missouri statutes imposing this standard, §§ 633.115 and 630.115.1(10) RSMo (1986) (T. 2/10-11). See also 42 U.S.C. § 6009(2) (1988). The district court, however, made no ruling on whether Mr. Kohl's current placement at Northwest Habilitation Center in St. Louis is a less restrictive environment than would be placement in respondents' facilities, hence the Eighth Circuit's ruling that remand was required for such a ruling. The Eighth Circuit, in a section of the opinion subscribed to by all panel members, stated that

> If Kohl is currently in the least restrictive environment suitable for his care and is no longer being recommended by the [Missouri Department of Mental Health] for transfer to Woodhaven, an injunction ordering such a transfer would serve no remedial purpose. On remand the district court should determine whether Northwest is in fact the least restrictive environment for Kohl.

865 F.2d at 935. The courts recognize the importance of a determination of the appropriate environment being made in accordance with sound professional standards and in accor-

dance with decisions of state officials. *S.H. v. Edwards,* 860 F.2d 1045 (11th Cir. 1988), *cert. denied,* 57 U.S.L.W. 3826 (1989).

The only relief sought by petitioner in this litigation is an injunction ordering respondents to accept Mr. Kohl. If the district court finds that he is currently housed in facilities less restrictive than respondents', such an injunction cannot issue. As the Eighth Circuit stated, "An injunction is an equitable remedy shaped to right an ongoing wrong, . . . and will not issue if it cannot serve a proper remedial purpose." *Kohl,* 865 F.2d at 934.

At the district court trial, besides seeking judicial notice of the "least restrictive environment" standard, the only evidence offered by petitioner on this issue was testimony which was recanted in an affidavit filed with the district court after trial. On the other hand, respondents presented opinion testimony of two experts who both said that Northwest Habilitation Center was a less restrictive environment than the facilities and programs of the respondents. After the Eighth Circuit's decision in this case, additional facts have become known which disclose even more decisively that this entire case should be disposed of on the "least restrictive environment" issue. When respondents received the opinion of the Eighth Circuit, anticipating either their own summary judgment motion upon remand or petitioner's motion for rehearing, respondents immediately sought updated information on this issue and obtained affidavits which were disclosed to petitioner and to the Eighth Circuit when a rehearing was sought by petitioner.

The trial evidence and affidavits which are now part of the record in the courts below collectively establish the following facts. Since March 10, 1987, approximately two months before the district court trial of this case, Dennis Kohl has been placed at the Northwest Habilitation Center in St. Louis, a new facility of the Missouri Department of Mental Health which opened on or just before that date. Since that date Mr. Kohl has been

housed in an environment which is less restrictive than the proposed placement at Woodhaven which is sought in this litigation. Furthermore, Mr. Kohl's guardian, his mother Jean Kohl, in whose name this action is being pursued, has repeatedly told staff at Northwest Habilitation Center that she is happy with Dennis's placement there, has participated in conferences at which it was concluded that his present placement was the least restrictive and most appropriate environment for him, and has agreed with such decisions and signed documents indicating her agreement with such decisions.

Under the present circumstances of this case, review by the Supreme Court could very well produce what would amount to an advisory opinion, since, without a determination by the district court on the "least restrictive environment" issue, no judgment can be rendered which will conclude the litigation and which can be executed. *See Muskrat v. United States,* 219 U.S. 346 (1911); *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937).[1]

Because an opinion by the Supreme Court at this time on the issues presented in the petition very possibly will make no difference in the ultimate resolution of this case, the petition should be denied.

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[1] Respondents also are considering asking the district court on remand to make findings on whether attorneys' fees should be assessed under 28 U.S.C. § 1927 or 29 U.S.C. § 794a(b) and 42 U.S.C. § 2996e(f), given how clear the facts seem to be on this least restrictive environment issue, given that petitioner has not produced any evidence in his favor on this issue or affidavits contradicting those of respondents, and given the disclosure of Mrs. Kohl's position on this issue, about which petitioner's attorneys either knew or should have known.

II. The Petition Should Be Denied Because The Court Of Appeals Opinion Does Not Conflict With *Arline*.

Part I of the petition argues that the Eighth Circuit's opinion, contrary to *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987), counsels against deferring to medical experts on medical matters. Pet. at 11-12. In fact, however, the Eighth Circuit both counsels and practices careful judicial attention to medical experts on medical matters, without abdicating the proper judicial role to such experts. The Eighth Circuit's ruling on this issue is the opposite of how it has been characterized in the petition.

The Eighth Circuit's opinion, in the only section challenged by petitioner, section V.C., begins by quoting the relevant sections of this Court's opinion in *Arline* identifying and explaining the two-part test to be applied in determining whether an individual with a contagious disease is "otherwise qualified" as that term is used in section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The Court of Appeals then states its conclusion that the test was misapplied by the district court by commingling the two parts of the test and by giving unwarranted deference to one of several medical witnesses whose testimony was before the court. The opinion then reviews the factors in the *Arline* test and reviews the district court opinion, pointing out in what respects that opinion was at odds with the *Arline* test. Specifically, the Court of Appeals found that the district court never fully applied the first part of the test, determining whether Mr. Kohl posed a significant risk to others. Regarding the second part of the test, whether reasonable accommodation can be made, the Court of Appeals concluded that the district court minimized the costs and administrative burdens that would be imposed upon respondents by the inoculation program proposed by the district court, and also concluded that it was erroneous for the district court to give decisive weight to one aspect of hypothetical testimony by one witness, simply because he happened to be a public health official. The opinion

observes that, after *Arline,* cases such as this cannot be decided by a mechanical rule which identifies a public health official and then puts the force of the court behind his recommendations, especially where, as demonstrated here, the official had no knowledge of the institutions involved and where his own general recommendation was different from the recommendations he made based upon hypothetical facts and was also at odds with the medical recommendations made by experts, including other public health officials, who did have direct knowledge of the institutions involved and to whom some deference also is required by caselaw. Still examining the district court's decision to give decisive weight to part of the testimony of one witness who was a public health official, the opinion also notes that a decision on the second, "reasonable accommodation," part of the "otherwise qualified" test, according to the explicit language of this Court's *Arline* decision, is the responsibility of the court to make, in light of the medical findings. The Court of Appeals then proceeded to examine the testimony of all witnesses, including medical experts, and was "left with a firm conviction" that the district court's plan was erroneous because it would expose respondents' staffs to an unreasonable risk. *Kohl,* 865 F.2d at 940.

In straining to find a conflict with *Arline,* petitioner misquotes the Eighth Circuit opinion by leaving out the word "specifically" in the following sentence. "Furthermore, *Arline* specifically requires deference to public health officials in the ordinary course only when ascertaining the risk to others under the first part of the test." *Kohl,* 865 F.2d at 939. See petition at 10. By deleting a word from the Eighth Circuit's opinion, the petitioner attempts to cast that opinion as a reckless admonition to ignore medical experts and thus obscure the fact that the opinion actually is a careful judicial examination of this Court's opinion in *Arline* and all medical evidence in the case.

Petitioner's argument in this section seeks to uphold the district court's deference to its own characterization of one

aspect of the testimony of a single medical expert, Dr. Denny Donnell, to the exclusion of other aspects of his own testimony and all other medical testimony in the case, simply because he was in fact a public health official. Petitioner can prevail in this litigation only if such blind deference is practiced. The argument thus is not what it seems. Petitioner does not really seek a ruling which expands the role of medical knowledge and advice in proceedings such as this. Rather, petitioner really seeks to uphold the mechanical rule used by the district court which identified from among others who qualified as public health officials[2] a single witness to be characterized as "the public health official" and put the force of law behind selected parts of his testimony. See *Kohl*, 865 F.2d at 941.

The careful judicial deference to medical and other experts which was in fact counseled and practiced by the Eighth Circuit is thus entirely consistent with this Court's decision in *Arline*, as well as with its decisions in cases involving similar issues and with the decisions of other Courts of Appeal interpreting section 504 of the Rehabilitation Act. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court determined that an institutionalized retarded patient was entitled to "reasonable habilita-

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[2] The district court received testimony from Dr. Mohammad Akhter, who was in charge of the Missouri Department of Mental Health program designed to deal with hepatitis B within institutions of that department, who certainly was a public health official, from Dr. Michael Cooperstock, a specialist in infectious diseases from the University of Missouri, from Dr. Clarence Pickard, medical director for Woodhaven Learning Center, and from the Executive Directors of both respondents, all of whom testified that the plan ultimately accepted by the district court was not what really should be done. All of these persons qualify under some definitions as public health personnel. See 42 U.S.C. 295h-2(d). In fact, as the Eighth Circuit noted, even Dr. Donnell and Dr. Perrillo, petitioner's other expert, agreed with this basic recommendation that all of respondents' staff members who could reasonably come into contact with Mr. Kohl should be inoculated.

tion," and then found that in determining what is reasonable in such matters, Courts must show deference to the judgments exercised by qualified professionals. *Id.* at 306-07. See also *S.H. v. Edwards,* 860 F.2d 1045 (11th Cir. 1988), *cert. denied,* 57 U.S.L.W. 3826 (1989); *Doe v. New York University,* 666 F.2d 761, 776 (2d Cir. 1981) (some deference to institution itself on "otherwise qualified" inquiry under § 504); *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority,* 718 F.2d 490, 496-97 (1st Cir. 1983) (deference to relevant agencies in deciding what accommodations are required); *Doe v. Region 13 Mental Health - Mental Retardation Commission,* 704 F.2d 1402, 1410 (5th Cir. 1983) (deference to program administrators).

This case does not really present the first question upon which petitioner seeks review. That question is phrased thus in the petition:

> Does this Court's decision in *School Board of Nassau County, Florida v. Arline* require the trial court to defer to reasonable medical judgments of public health officials in determining whether proposed accommodations for a contagious individual will eliminate any significant risk of transmitting the disease to others?

The obvious answer is "Of course." It is submitted that such deference to the public health officials who testified was in fact practiced in a careful, judicial way, and the Eighth Circuit opinion therefore does not conflict with *Arline.*

III. The Petition Should Be Denied Because The Court Of Appeals Applied The Proper Standard Of Review.

In Point II of the petition it is asserted that the Court of Appeals conducted an unpermitted *de novo* review and failed to apply the "clearly erroneous" standard required by Federal Rule of Civil Procedure 52(a). It is even asserted that the Court of Appeals failed to identify the standard it was applying. Pet. at 17.

In fact, however, the Court of Appeals repeatedly acknowledged the "clearly erroneous" standard, at least three times using those words in the course of its opinion. *Kohl,* 865 F.2d at 934, 935, 936. Furthermore, it plainly applied the proper standard and found both errors of law and clearly erroneous factual findings. The Court of Appeals concluded, in the only section of the opinion challenged by the petition, that "the district court misapplied the *Arline* test in two ways," 865 F.2d at 937, which respondents summarized in Point II.

The petition asserts strenuously and repeatedly that, in section V.C. of the opinion, the Court of Appeals did not even acknowledge, much less apply, the "clearly erroneous" standard. That standard, however, has been defined in exactly the language used by the Court of Appeals, even in the very case relied upon by petitioner. " 'A finding is "clearly erroneous" when although there is evidence to support it, *the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.*' " *Anderson v. City of Bessemer City,* 470 U.S. 570, 573 (1985) (emphasis added), *quoting United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). The Court of Appeals plainly applied this standard because, after a detailed review of the entire evidence, the opinion states: "After reviewing the record, *we are left with a firm conviction* that the limited inoculation plan [ordered by the district court] would expose the Woodhaven staff to an unreasonable risk." 865 F.2d at 940 (emphasis added).

In this section of the petition, it is also suggested that the Court of Appeals engaged in second-guessing the trial court on issues of credibility of witnesses. Issues of credibility were never presented, however, because, as the Court of Appeals noted, no real disagreements existed among the experts who testified regarding what should be done if Mr. Kohl were admitted. Petitioner's expert medical witnesses both testified that the ideal situation would be for all employees of respondents to be vaccinated against hepatitis B (T. 1/150, 170-78, 201; 5/14), and

that anyone with a significant chance of coming into contact with Dennis Kohl ought to be inoculated (T. 1/149; 5/5-6). Respondents' own consultants made the same recommendation and translated it as requiring inoculation of all staff, given the open nature of the facilities and the clients' freedom to move about (T. 3/16-17, 29-31). Petitioner's expert Dr. Donnell testified he had no quarrel with the administrative decision to inoculate all staff before Mr. Kohl was readmitted (T. 5/14). Both of petitioner's experts admitted that they knew nothing about Dennis Kohl or respondents' institutions (T. 1/161-64; 5/8). Those witnesses familiar with the institutions gave detailed explanations of the circumstances at the institutions (T. 3/161-72; 4/88-91) and gave unchallenged testimony that "almost everyone has daily contact or frequent contact with the residents" (T. 3/169).

Petitioner also asserts in this section of the petition that the Court of Appeals improperly made its own factual findings on central issues rather than remanding to the district court for new fact-finding. Again the Court of Appeals opinion has been mischaracterized. The Court of Appeals clearly contemplated new fact-finding by the district court on the "otherwise qualified — reasonable accommodation" issue upon remand because in footnote 5 of the opinion the Court stated "If on remand the district court determines that Kohl cannot be reasonably accommodated and therefore is not otherwise qualified for the Woodhaven programs . . . ." 865 F.2d at 936 n.5.

Because the Court of Appeals properly found both errors of law and clearly erroneous factual findings, did not engage in judging credibility of witnesses, and did order remand for additional consideration and fact-finding by the district court, the proper standard of review was applied, and this case does not present the second question upon which petitioner seeks review.

CONCLUSION

For the reasons given, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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